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No. 86-209

In the Supreme Court of the United States

OCTOBER TERM, 1986

HUNTER ENGINEERS & CONSTRUCTORS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 3505 of the Internal Revenue Code provides that, where a lender furnishes funds directly or indirectly to an employer for the payment of wages, the lender in certain circumstances may be personally liable if the required employment taxes are not withheld from those wages and paid over to the IRS. The question presented is whether, as a prerequisite to the government's maintenance of a civil suit to collect the lender's personal liability in such circumstances, the IRS must have sent to the lender, within 60 days of making an assessment of the unpaid taxes against the employer, a copy of the tax bill that is required to be sent to the employer under Section 6303(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 789 F.2d 1436. The opinion of the district court (Pet. App. 13a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1986. The petition for a writ of certiorari was filed on August 11, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On December 5, 1983, the United States brought this action in the United States District Court for the District of Hawaii against petitioner, a construction contractor with business offices in Honolulu, Hawaii (Pet. App. 16a-18a). The government alleged that petitioner, beginning in the

second quarter of 1977, had lent funds to L & L Construction, Inc., under circumstances that rendered petitioner personally liable, pursuant to Section 3505 of the Internal Revenue Code,* for a portion of L & L Construction's unpaid withholding taxes. Petitioner moved for summary judgment, contending that the action could not be brought because the government had not provided it with notice of the tax assessments against L & L Construction within the 60-day period specified in Section 6303(a).

The district court granted petitioner's motion for summary judgment (Pet. App. 13a-15a). Relying on *United States* v. *Associates Commercial Corp.*, 721 F.2d 1094 (7th Cir. 1983), the district court held that the notice and demand for payment specified in Section 6303(a) must be sent, not only to the taxpayer against whom social security and withholding taxes have been assessed, but also to third parties against whom the government might in the future seek to establish personal liability, in a civil suit commenced under Section 3505, for any part of the withholding taxes. Because the government had not notified petitioner of the assessments against L & L Construction within 60 days of making the assessments, the district court held that the government's suit was barred. Pet. App. 14a-15a.

The court of appeals reversed (Pet. App. 1a-12a). It expressly declined to follow the Seventh Circuit's decision in *Associates Commercial, supra*, and the Eleventh Circuit's subsequent decision in *United States* v. *Merchants National Bank*, 772 F.2d 1522 (1985), petition for cert. pending, No. 85-1480. See Pet. App. 4a-5a. Rather, the court of appeals adopted the Third Circuit's holding in *United States* v. *Jersey Shore State Bank*, 781 F.2d 974 (3d Cir. 1986), cert. granted, No. 85-1736 (June 2, 1986), and

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* Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

ruled that "the government is not required to provide a lender with section 6303(a) notice as a prerequisite to a section 3505 action" (Pet. App. 5a).

DISCUSSION

This case presents a question identical to that now pending before the Court in *Jersey Shore State Bank* v. *United States*, No. 85-1736. That question is whether the government, as a prerequisite to its maintenance of a civil suit to collect a lender's personal liability under Section 3505, must have sent to the lender, within 60 days of making an assessment of social security and withholding taxes against the employer, a copy of the tax bill that is required to be sent to the employer under Section 6303(a). We believe that the Ninth Circuit in the instant case, like the Third Circuit in *Jersey Shore*, correctly concluded that Section 6303(a) does not require such notice. Since the question presented here and in *Jersey Shore* is a pure question of statutory construction unaffected by the facts of the two cases, and since the opening brief in *Jersey Shore* has already been filed, we see little merit in petitioner's suggestion (Pet. 8) that the two cases should be "joined for argument." Rather, it would be appropriate for the Court to hold this case pending the outcome in *Jersey Shore*, the course that the Court has adopted with respect to our petition in *United States* v. *Merchants National Bank*, No. 85-1480.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of this Court's decision in *Jersey Shore State Bank* v. *United States*, No. 85-1736.

Respectfully submitted.

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